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November 10, 2003

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Reply Comments, CC Docket Nos. 01-338 *et al.*, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*

Dear Ms. Dortch:

Attached for filing in the above-captioned docket please find the Reply Comments of the CLEC Coalition: KMC Telecom Holdings, Inc., NuVox Inc., SNiP LiNK LLC, Talk America, XO Communications, Inc., and Xspedius LLC.

Please do not hesitate to contact me with any questions or concerns regarding this matter: 202.955.9890.

Sincerely,

Stephanie A. Joyce
Counsel for the CLEC Coalition parties

Attachment

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	**CC Docket No. 01-338**
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	**CC Docket No. 96-98**
Deployment of Wireless Services Offering Advanced Telecommunications Capability	**CC Docket No. 98-147**

REPLY COMMENTS OF THE CLEC COALITION

KMC TELECOM HOLDINGS, INC.,
NUVOX INC.,
SNiP LiNK, LLC,
TALK AMERICA,
XO COMMUNICATIONS, INC.,
AND XSPEDIUS LLC

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November 10, 2003

SUMMARY

The elimination of pick-and-choose has no basis in Section 252(i) or in the Supreme Court's interpretation of that statute. Nor does the Commission have a basis in this record to institute such a complete reversal of policy. The proposed action thus appears to be little more than another gambit propped up by the incumbents to delay CLECs' entry and increase their costs.

It is telling that MPower, whose Petition for Rulemaking first suggested the elimination of pick-and-choose, has completely rescinded its request. MPower's change of position typifies the prevailing situation in the competitive telecommunications industry: the incumbents continue to hold all the cards. Dozens of CLECs have made it clear in this record that they have faced and continue to face delay and bad faith in negotiating with ILECs, and that the existence of the pick-and-choose rule is an essential tool for securing agreements that enable them to serve customers.

The record also demonstrates that the elimination of pick-and-choose would enable the ILECs to discriminate against or otherwise disadvantage competitors — for example, by the use of "poison pills" — and preclude their entry. The past conduct of incumbents, described in some detail by the CLEC Coalition and other carriers, suggests that incumbents employ a variety of means to impose expense and delay during negotiations. This motivation is in fact revealed by the ILECs' insistence that, although poison pills could become a real phenomenon, existing principles of nondiscrimination will constrain that conduct. Their failure to adhere to such principles thus far renders this assurance extremely suspect.

The Commission's proposal to retain pick-and-choose within SGATs met with almost uniform resistance. Competitors find SGATs nearly unusable, while ILECs believe that they invite onerous "mega-arbitrations" and are too stringent. In addition, there is no agreement

in the record as to which types of documents constitute "SGATs," or how the proposal would apply to non-Bell incumbents that are not compelled to file SGATs. Thus, the one thing on which both CLECs and ILECs agree is that the SGAT concept is unworkable.

The elimination of pick-and-choose is therefore not supported in the record. What is more in keeping with Section 252 as well as practical experience is for the Commission to retain the rule, and amend it to make it more transparent and enforceable. The CLEC Coalition therefore urges the Commission to adopt the three guidelines discussed in its comments, which in part were echoed in other party comments, in order to make interconnection negotiations more efficient and productive.

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REPLY COMMENTS OF KMC TELECOM HOLDINGS, INC., NUVOX INC., SNiP LiNK, LLC, TALK AMERICA, XO COMMUNICATIONS, INC., AND XSPEDIUS LLC

KMC Telecom Holdings, Inc. ("KMC"), NuVox Inc. ("NuVox"), Talk America ("Talk"), XO Communications, Inc. ("XO"), and Xspedius LLC ("Xspedius") (collectively the "CLEC Coalition"),[1] through counsel, hereby submit their joint reply comments in the above-captioned proceeding.[2]

Because, as the record demonstrates, the elimination of pick-and-choose is contrary to the plain language of Section 252(i), 47 U.S.C. § 252(i), as well as sound public policy, the Commission should not only retain Rule 51.809, but strengthen it, in the manner that the CLEC Coalition and others have proposed.

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[1] Excel Telecommunications, Inc. and VarTec Telecom, Inc. are not participating in the reply round of this proceeding.

[2] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003), published at 68 Fed. Reg. 52276 (Sept. 2, 2003) ("*FNPRM*").

I. INTRODUCTION: Unmasking the Myths About Pick-and-Choose

The comments in this proceeding have revealed several falsehoods that together make up what would be the foundation for a major policy reversal in the form of eliminating pick-and-choose. A clear understanding of how these misconceptions have operated in this proceeding will help the Commission avoid being goaded into a decision that will have disastrous results for competition.

1. Myth: ILECs cannot negotiate freely with CLECs under the present rule because CLECs "cherry-pick."

The ILECs have apparently convinced the Commission that "incumbent LECs seldom make significant concessions in return for some trade-off for fear that third-parties will obtain the equivalent benefits without making any trade-off at all."[3] Nearly all CLEC comments on this issue, both those in response to the Mpower Petition and those submitted here, refute that contention.[4] As the CLEC Coalition[5] and others explain,[6] the ILECs' reliance on the "legitimately related" rule has precluded CLECs from engaging in anything approaching "cherry-picking." Unfortunately, the *FNPRM* failed even to mention the existence of the "legitimately related" principle, likely because the ILECs do not want to publish their negotiation

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[3] *FNPRM* ¶ 722 (citing Verizon Comments on Mpower Petition at 2; Qwest Comments on Mpower Petition at 1-2; BellSouth Comments on Mpower Petition at 2-3; USTA Reply on Mpower Petition at 3-4).

[4] CC Docket No. 96098: Z-Tel Comments on Mpower Petition at 2-3; Sprint Comments on Mpower Petition at 2; AT&T Comments on Mpower Petition at 6-7. CC Docket No 01-338: CLEC Coalition Comments at 13-16; LecStar Comments at 3-5; American Farm Bureau Comments at 11; ALTS Comments at 5; Mpower Comments at 7; PACE Comments at 5-6; Sprint Comments at 4.

[5] CLEC Coalition Comments at 18-21.

[6] *See* MCI Comments at 21; US LEC Comments at 6; Mpower Comments at 9-10.

tactics to the Commission.[7] This crucial issue therefore was overlooked by many parties, including the state commissions.[8]

As to the validity of the cherry-picking argument, LecStar "challenges the ILECs to present evidence of widespread 'cherry-picking' of a contract concession without the corresponding contractual quid pro quo."[9] They are unlikely to provide any credible evidence of such conduct on the part of CLECs. Indeed, through several rounds of comments, the record contains no such evidence.

2. **Myth: Pick and choose is a failure due to CLEC conduct.**

It is at the least ironic that the ILECs now come to the Commission to decry pick-and-choose as a failure.[10] True, the ILECs are correct that "the current rule is not working as it was intended,"[11] and indeed the same could be said of the 1996 Act generally. Verizon, more specifically, trumpets the fact that "only a tiny fraction" of CLECs have used pick-and-choose.[12] This position is, however, too convenient — the scofflaw blaming the law for failing to curb unlawful conduct. The *FNPRM* is infected with this spin;[13] as NASUCA observes, "[t]he Commission has correctly recognized the effect, but has failed to identify the cause."[14]

The more aggravating myth is that the CLECs are to blame for any shortcomings in the Commission's current pick-and-choose rule. For example, Qwest has the temerity to

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7 "Legitimately related" does not appear in the comments of Verizon, BellSouth or Qwest.

8 None of the state commission commenters — the New York PSC, the California PUC and the Public Utilities Commission of Ohio — addressed the "legitimately related rule."

9 LecStar Comments at 3.

10 BellSouth Comments at 5; Qwest Comments at 3; Verizon at 2.

11 Qwest Comments at 3.

12 Verizon Comments at 3.

13 *E.g.*, *FNPRM* ¶¶ 722 ("We next seek comment on the extent to which the pick-and-choose rule impedes meaningful negotiations."), 724 (seeking alternative rules "in light of the shortcomings of the pick-and-choose regime").

14 NASUCA Comments at 7.

assert that "many interconnection negotiations are currently combative or marked by posturing, delays, threats, and unproductive brinkmanship."[15] Qwest flatly states that CLECs are the parties resorting to such behavior.[16] The real-world experiences related by the CLEC Coalition[17] and other pro-competitive entities,[18] which describe several instances of patent bad faith and stonewalling by the ILECs, demonstrate that this suggestion is simply false.

3. Myth: The ILECs have a business incentive to engage in laissez-faire negotiations.

The consistent theme among ILEC comments is that, but for pick-and-choose, incumbents would gladly engage in fair and balanced arms-length negotiations typical of other commercial settings.[19] Again (and much to our dismay), the *FNPRM* echoes this false sentiment.[20] Yet this position is simply illogical given the persistent monopolistic landscape of the market. The ILECs retain control over almost 90% of local facilities;[21] it is worse than naïve to believe that they willingly would give that control away.[22] Thus, the principal compulsion that provides the ILECs incentives to negotiate with any sense of fair play are the FCC's

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15 Qwest Comments at 4.

16 Qwest Comments at 5.

17 CLEC Coalition Comments at 14-16.

18 MPower Comments at 9-10; US LEC Comments at 7; NASUCA Comments at 11-13.

19 BellSouth Comments at 2-3; Qwest Comments at 4-5; SBC Comments at 3-5; USTA Comments at 4-5; Verizon Comments at 2-3.

20 *FNPRM* ¶¶ 713, 722.

21 The ILECs control 87% of local loops nationwide. CLEC Comments at 10 (citing *Federal Communications Commission Releases Data on Local Telephone Competition*, News Release (June 12, 2003)).

22 *See* Z-Tel Comments at 4-7; ALTS Comments at 7; Sprint Comments at 4; MCI Comments at 9 ("Incumbent LECs would also have every incentive to slow-roll negotiations in an effort to delay competitive entry.").

implementing rules, including pick-and-choose. Without that compulsion, it would be literally irrational, in a business sense, for ILECs to negotiate openly with competitors.[23]

The elimination of pick-and-choose would limit the ILECs' competitive exposure by eliminating the opportunity of smaller carriers to gain access to terms secured by the largest competitors. Notably, the benefit of these terms often is merely a commitment by the ILEC to comply with the law — something that often is missing from standard ILEC interconnection agreement offerings.

4. Myth: CLECs can always arbitrate where they cannot find an acceptable agreement.

As the CLEC Coalition explained in its comments, eliminating pick-and-choose will impose a Hobson's choice on CLECs: either take the complete agreement, regardless of its merit, or negotiate from scratch.[24] To "negotiate from scratch" is, of course, nearly coterminus with "arbitrate."[25] Arbitration exerts a tremendous cost on CLECs, however, in two ways. First, arbitration requires a good deal of labor and expense to pursue. Second, arbitration delays a CLEC's entry, and ability to serve customers, by orders of magnitude. It is not a task that is lightly chosen, as the ILECs seem to believe.[26] Thus, the proposed radical change in policy, which would virtually force CLECs into arbitration, should similarly not be lightly adopted.

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[23] Indeed, Verizon argued to the Supreme Court in its brief in the *Trinko* case that conduct having an anticompetitive effect should nonetheless be legitimized under the antitrust laws so long as it has some rational business justification. Brief of Petitioner at 11 (Case No. 02-682 (May 23, 2003)). Thus, Verizon has no qualm about harming competition in the name of good business. Its continual quest for legal permission, or to evade legal sanction, for this conduct simply reveals its intent to harm competition as much as possible.

[24] CLEC Coalition Comments at 16.

[25] CLEC Coalition Comments at 16; Z-Tel Comments at 9 ("Real progress on issues is generally made only through the state arbitration process."); MCI Comments at 13 (CLECs would be unable to obtain favorable terms "[u]nless they file for arbitration"). The result of failing to arbitrate is simply forced acceptance of ILEC-proposed terms, no matter how onerous or otherwise unfavorable to the CLEC.

[26] SBC Comments at 5; Qwest Comments at 4.

5. Myth: Requiring the adoption of identical agreements leads to diversity in agreements.

The CLEC Coalition remains bewildered[27] by the consistent position of the ILECs that requiring CLECs to adopt agreements in their entirety will result in a more diverse set of agreements.[28] Exactly the opposite result is more likely to occur. Given a choice between taking an entire preexisting agreement and negotiating (arbitrating) a new one, CLECs — especially smaller CLECs — will likely take the agreement. As explained above, they cannot arbitrate every time in every state. The outcome will be an oligopoly of rubber-stamped, identical agreements. Thus, if the Commission's intent truly is to avoid "one-size-fits-all agreements,"[29] which the CLEC Coalition considers a laudable goal, the proposed elimination of pick-and-choose is exactly the wrong decision. In short, pick-and-choose creates diversity by allowing CLECs to fold together the terms of more than one agreement.

II. THE RECORD DOES NOT SUPPORT AN ACTION THAT WOULD IGNORE CONGRESS'S MANDATE TO PERMIT CLECs TO ACCEPT "ANY" PORTION OF AN INTERCONNECTION AGREEMENT UNDER SECTION 252(i)

Competitive LECs participating in this proceeding overwhelmingly agree that the plain language of Section 252(i) precludes the Commission from abolishing pick-and-choose.[30] And let there be no mistake: contrary to Qwest's wishful suggestion that "[t]he Commission is not trying to eliminate the pick-and-choose rule altogether,"[31] the proposed action would eradicate the ability of CLECs to invoke Section 252(i) in a manner that remotely resembles

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27 CLEC Coalition Comments at 9-10.

28 SBC Comments at 4 (pick-and-choose creates "homogenized, one-size-fits-all agreements"); Qwest Comments at 5; Verizon Comments at 3.

29 *FNPRM* ¶ 722.

30 CLEC Coalition Comments at 3-5; PACE Comments at 3-5; MCI Comments at 4-8; US LEC Comments at 1-3; American Farm Bureau Comments at 4-6; ALTS Comments at 2-4; LecStar Comments at 6; Z-Tel Comments at 13-16. *See also* NASUCA Comments at 2-3 (reversing rule would require "rigorous review"). *But see* PaeTec Comments at 7 (FCC has authority under Section 252(i) to eliminate rule).

31 Qwest Comments at 10.

what Congress intended. The record is quite clear in explaining that such a result flatly violates the statute. In short, there is broad agreement that "any" means "any," and that nothing in the Supreme Court's decision in *Iowa Utilities*[32] would permit the Commission to read that mandate out of the statute.

ILEC commenters now present the rather tortured interpretation that the phrase "under the same terms and conditions" in Section 252(i) renders the entire provision ambiguous.[33] For support, they site to Justice Scalia's discussion of Congress's language and "cherry-pick" his isolated phrase that the three limitations on pick-and-choose, which render the rule "more generous to incumbent LECs than § 252(i) itself,"[34] are "eminently within the Commission's expertise."[35] Yet, Justice Scalia in no way stated that the section is ambiguous, nor did he support the ILECs' argument that an alleged ambiguity permits the FCC to ignore the operative phrase "any interconnection, service, or network element provided under an agreement approved under this section." 47 U.S.C. § 252(i).

The ILECs' interpretation fails because it violates a key precept of statutory interpretation: that each word in a statute must be given operative effect.[36] As Justice Scalia has written, "[i]t is an ancient and sound rule of construction that each word in a statute should, if possible, be given effect. An interpretation that needlessly renders some words superfluous is suspect."[37] In addition, the Commission "is not entitled to deference when it goes beyond the

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32 *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

33 BellSouth Comments at 6; Qwest Comments at 8-9; SBC Comments at 6-7; USTA Comments at 4; Verizon Comments at 8.

34 525 U.S. at 396.

35 BellSouth Comments at 6; Qwest Comments at 9; SBC Comments at 7; USTA Comments at 4; Verizon Comments at 8 (citing 525 U.S. at 396).

36 *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)).

37 *Crandon v. United States*, 494 U.S. 152, 171 (1990) (Scalia, J., concurring).

meaning that the statute can bear."[38] Under this standard, the proposal to abandon pick-and-choose is decidedly suspect.

The ILECs have not only read out the operative words of Section 252(i), which unequivocally empower a CLEC to take "any" provision of an existing agreement, but they have inexplicably taken what was intended as a prohibition on discriminatory conduct — ILECs must provide a contract provision "under the same terms and conditions" — and made it an excuse to discriminate. Under this interpretation, rather than comply with the statute and give a CLEC what it requests, the ILECs purportedly may force a CLEC to take what it does not request. This outcome is plainly absurd, and nullifies the statute altogether. For Congress' intent in enacting Section 252(i) was quite clear: to "make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated."[39] The Commission thus cannot rely on the ILECs' questionable interpretation of Section 252(i) to abolish pick-and-choose, as such action plainly "goes beyond the meaning that the statute can bear."

III. THE COMPETITIVE INDUSTRY AGREES THAT ELIMINATING PICK-AND-CHOOSE WILL ONLY EXACERBATE THE ILECs' DOMINANCE IN NEGOTIATIONS

It is widely agreed in this record that incumbents retain, by virtue of their control over the local network and surpassing financial resources, an overwhelming advantage in bargaining power over CLECs in contract negotiations.[40] Thus, as Sprint aptly states, the notion that absent pick-and-choose "ILECs will ever willingly make concessions to CLECs which are

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38 *MCI Telecom. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (affirming *vacatur* of FCC mandatory detariffing rules for interexchange carriers).

39 S. Rep. No. 104-23, 104th Cong., 1st Sess. at 21-22 (1995) (emphasis added).

40 CLEC Coalition Comments at 2, 9-11; American Farm Bureau Comments at 3; ALTS Comments at 6; LecStar Comments at 2-3; MPower Comments at 7; NASUCA Comments at 9-11; PACE Comments at 5-7; RICA Comments at 3; Sprint Comments at 4; US LEC Comments at 3-4; MCI Comments at 9-11; Z-Tel Comments at 3-7.

contrary to [their] own self-interest is unrealistic."[41] It is because the Commission has failed to apprehend this circumstance that the proposed elimination of pick-and-choose is so unsound.[42] The almost universal experience of CLECs demonstrates that they consistently face dilatory and discriminatory tactics during negotiations, mitigated only by their Section 252(i) rights, including the use of pick-and-choose. Were the rule abolished, CLECs anticipate that rampant anticompetitive conduct, in the form of unmitigated stonewalling and "poison pills," would result. The only CLEC that dissents from this position is PaeTec, whose comments reflect a negotiating experience that is wholly dissimilar from the experience of other CLEC participants in this proceeding.[43]

A. CLECs Have Demonstrated that Pick-and-Choose Is Necessary to Provide Negotiating Leverage Against Incumbents

Numerous participants in this proceeding have emphasized that the competitive industry has little or no bargaining power with the ILECs.[44] The cause of this disparity should be intuitive: ILECs were given monopoly control over the local network, they wish to keep that control, and every interconnection agreement they sign increases the likelihood that they will relinquish some of that control. Accordingly, "the ILECs have nothing to gain and everything to lose from negotiating agreements with CLECs."[45]

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41 Sprint Comments at 2.

42 *See* Z-Tel Comments at 3; NASUCA Comments at 7 ("The Commission has correctly recognized the effect, but has failed to identify the cause.").

43 PaeTec states that it "believes that eliminating the pick-and-choose rule will encourage more flexible negotiations, which will accrue particularly to the benefit of facilities-based competitors." PaeTec Comments at 6.

44 *E.g.*, CLEC Coalition Comments at 2 (comprising 8 parties), 9-11; PACE Comments at 5 (comprising 17 parties); ALTS Comments at 5-6; American Farm Bureau Comments at 3 (comprising 5 parties).

45 Z-Tel Comments at 7.

The disparity in bargaining power is most sharply felt with respect to smaller CLECs.[46] These companies "cannot realistically be expected to negotiate, arbitrate and litigate every provision of every interconnection agreement," because they do not have the resources.[47] Or, as LecStar observes, a small CLEC that does pursue arbitration likely achieves only "a Pyrrhic victory: destroying the company to arbitrate a fair agreement."[48] Larger CLECs are not in this position, setting up a clear discriminatory rift among competitors that Section 252(i) was intended to avoid.

Among the most poignant evidence of the fact that CLECs remain overshadowed by ILECs comes from MPower's comments. Having formally withdrawn the Petition for Rulemaking that, at the least, spurred the *FNPRM*, MPower acknowledges that "CLECs remain, perhaps more than ever, at a severe bargaining disadvantage with [ILECs]."[49] The "hard times" that "have fallen upon the telecommunications industry" have forced MPower "to rethink the likelihood of the success of 'Flex' contracts,"[50] which itself demonstrates that any assumption that CLECs have equal negotiating weight as ILECs is simply false. Because this vast power chasm persists in the local market, pick-and-choose remains a necessary tool for CLEC entry.

B. The Risk of Poison Pills Is Not Mitigated by Existing Nondiscrimination Principles

Several commenters warn the Commission that the potential for ILECs to include poison pills in interconnection agreements is real and extremely harmful.[51] For although, as the

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46 CLEC Coalition Comments at 12; LecStar Comments at 5; ALTS Comments at 7.

47 ALTS Comments at 7.

48 LecStar Comments at 5.

49 MPower Comments at 5.

50 *Id.* at 5.

51 CLEC Coalition Comments at 7-8; MCI Comments at 13; US LEC Comments at 6; ALTS Comments at 14; Z-Tel Comments at 11-12.

ILECs contend, poison pills may not at this time be prevalent,[52] the existence of pick-and-choose gives the ILECs no reason to insert such provisions — the CLEC could avoid them. Were the Commission to abolish pick-and-choose, "the rational ILEC would be able to impede competitors by demanding inclusion of 'poison pill' provisions."[53] Knowing that CLECs are faced with an all-or-nothing regime, the ILECs would have every incentive to use poison pills in every agreement. Given the ILECs' questionable conduct thus far in the negotiation process, logic dictates that this result is inevitable.

Betraying their inclination to employ any unfair tactics at their disposal, the ILECs anticipate this argument by reassuring the Commission that existing prohibitions on discriminatory conduct will prevent poison pills.[54] According to Qwest, "these schemes would be limited by the good faith and nondiscrimination requirements of Sections 201, 202, and 251(c)(1)."[55] This argument is at best quaint. If the ILECs had found any one of these provisions to be a deterrent to discriminatory or unreasonable behavior, the CLEC Coalition, MPower and US LEC would not have had so many tales to tell about ILEC anticompetitive conduct.[56] The incumbents have made it increasingly clear that nondiscriminatory mandates have little or no weight in their decisionmaking process. It is therefore highly improbable that these provisions would now restrain the ILECs from erecting discriminatory barriers to entry by resorting to poison pills.

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52 Qwest Comments at 11-12; Verizon Comments at 5.

53 US LEC Comments at 6.

54 Qwest Comments at 11. *See also* BellSouth Comments at 3; CenturyTel Comments at 7.

55 Qwest Comments at 11.

56 CLEC Coalition Comments at 14-16; MPower Comments at 9-10; US LEC Comments at 7.

IV. THE COMMISSION CANNOT FORBEAR FROM ENFORCING SECTION 252(i)

Despite the Commission's clear repudiation of the proposition that it forbear from enforcing Section 252(i),[57] some commenters continue to advocate outright forbearance as the proper course in this proceeding.[58] Claiming that only forbearance will provide the "flexibility" to establish the "give and take inherent in the bargaining process,"[59] these pro-monopoly parties assure the Commission that Section 10 supports the shelving of Section 252(i) altogether. At bottom, this is the position advocated by all parties seeking to eradicate pick-and-choose, regardless of whether they expressly advocate forbearance. Yet the Commission has no grounds, directly or indirectly, to refuse to enforce Section 252(i) as it proposes to do.

A. There Is No Reasonable Basis to Conclude that Rescinding Pick and Choose Will Serve Competition

Section 10 of 1996 Act permits the FCC to forbear from enforcing any provision of Title II only after careful review of the market conclusively demonstrates that such provision is no longer in the public interest. Specifically, forbearance requires three separate determinations: (1) the provision "is not necessary to ensure that the charges, practices, classifications, or regulations" of carriers "are just and reasonable and are not unjustly or unreasonably discriminatory"; (2) the provision "is not necessary for the protection of consumers"; and (3) forbearance "is consistent with the public interest."[60] The elimination of pick-and-choose does not satisfy any of these requirements.

As described in Section II above, pick-and-choose is absolutely necessary to ensure that ILEC practices are not unjust, unreasonable or discriminatory. Without pick-and-

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57 *FNPRM* ¶ 726.

58 USTA Comments at 4; BellSouth Comments at 4-6.

59 USTA Comments at 4.

60 47 U.S.C. § 160(a).

choose, ILECs could and would subject CLECs to endless, expensive interconnection negotiations — and often arbitrations — in order to preclude their entry into the local market. The CLEC's inability to reject even a small portion of a preexisting agreement, be it a poison pill or simply an unnecessary obligation, will force them to begin the process from scratch. As many CLECs cannot engage in full-scale negotiation and arbitration, and most CLECs cannot do so in every instance, systemic discrimination would infect the competitive landscape.

Pick-and-choose is also necessary for the protection of consumers and the public interest. It is beyond dispute that local competition introduces innovative services and lower prices to the market. Delaying or precluding the entry of competitors through protracted negotiations robs the market of those benefits. Eliminating pick-and-choose would greatly enhance the likelihood of that result, as an all-or-nothing contract regime would force many carriers to begin negotiations afresh in every state. Full forbearance, which would nullify Section 252(i) as a practical matter, therefore also fails prongs two and three of Section 10. Quite simply, forbearance will diminish, and not increase, competition, and the Commission should maintain its tentative conclusion that such action is inappropriate.

B. Section 10 Does Not Permit the FCC to "Forbear" from Action That it Has No Authority to Perform

The 1996 Act does not give the Commission exclusive authority over the review and approval of interconnection agreements. As the CLEC Coalition explained,[61] Section 252(e) grants that power to the state commissions.[62] What the *FNPRM* proposes to do would unlawfully rob states of much of that authority, because it would prohibit states from rejecting an

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61 CLEC Coalition Comments at 5-8.

62 "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." 47 U.S.C. § 252 (i).

agreement that is discriminatory on its face, absent some evidence of intent to discriminate.[63] Complete forbearance with respect to pick-and-choose would effect the same result on a larger scale, as states would be relegated to rubber-stamping identical opt-in agreements. In effect, then, the ILECs advocate using Section 10 as a means of further eroding state jurisdiction. Nothing in the plain language of Section 10 or its legislative history indicates that such a purpose was Congress's intent.[64]

The FCC has held that one requirement for forbearance from enforcing a regulation is that the Commission must have jurisdiction to enforce the regulation in the first instance.[65] The ILECs' forbearance proposal represents the converse of that ruling: it essentially asks the Commission to forbear from enforcing an agreement review process over which it has no direct jurisdiction. The agency cannot, however, relinquish authority that it does not have. Forbearance is therefore not only counter to the interests of competition and consumers, it has questionable validity as a matter of law.

V. NEARLY EVERY PARTY REJECTS THE COMMISSION'S SGAT PROPOSAL

The record reveals resounding opposition to the Commission's proposal that CLECs' pick and choose rights be limited to items from SGATs on file with state Commissions.[66] In fact, every ILEC commenter except Qwest devoted considerable discussion

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63 *FNPRM* ¶ 726 & n.2150 (n. 2148 in subsequent version of order).

64 The premise of Section 10 is and must be that the Commission presently exert authority via a specific rule: the 1996 Act "also includes permissive authority for the Federal Communications Commission (FCC) to forebear from regulating when market forces are sufficient to protect consumers." H.R. Rep. No. 104-204, 104th Cong., 2d Sess. at 203 (1996).

65 *In the Matter of Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona*, NSD-L-97-6, Memorandum Opinion and Order, FCC 99-222, 14 FCC Rcd. 14392, 14402 ¶ 19 (1999) (affirming decision to modify LATA boundaries as being consistent with Section 10).

66 CLEC Coalition Comments at 16-18; American Farm Bureau Comments at 8-10; ALTS Comments at 9-12; BellSouth Comments at 6; MPower Comments at 8-9; NASUCA Comments at 23-24; CPUC Comments at 5; MCI Comments at 17-20; PACE Comments at 7-8; RICA Comments at 5-6; SBC Comments at 4-5; Sprint

to the "unnecessary"[67] nature of the SGAT exemption. Parties either do not understand it, do not support it, or both.

As an initial matter, there is palpable confusion in the record as to what the SGAT exemption means. CLECs believe that "SGAT" is a term of art deriving from Section 252, while certain ILECs apparently think that there is some benefit to be gained by having contracts such as the "Texas 271 Agreement" fall into the SGAT category.[68] With such dissension among parties, it is clear that no sector of the industry could validly endorse the proposal even if it were inclined to do so.

However fuzzy the parties' understanding of the Commission's SGAT proposal, their rejection of the proposal is certain. To the competitive industry, an SGAT is typically a hollow regulatory filing that does not and could not meet the needs of any entrant.[69] These unilateral offerings were created for wholly different purposes — Section 271 approval[70] — and were never foreseen as a means of "supplanting the 'pick and choose' rule."[71] Thus, the Rural Independent Carriers Alliance explains that "the RBOC is under no obligation or compunction ... to include in its SGAT other than the bare minimum required by sections 251 and 252."[72] As a result, they "contain only the most general terms and conditions for interconnection, UNEs and

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Comments at 5-7; USTA Comments at 5; US LEC Comments at 7-9; Verizon Comments at 5-7; Verizon Wireless Comments at 9; Z-Tel Comments at 13-14. Only Qwest supports the proposal. Qwest Comments at 11-12.

67 BellSouth Comments at 6; Verizon Comments at 6.

68 *E.g.*, SBC Comments at 5.

69 *E.g.*, CLEC Coalition Comments at 17; PACE Comments at 8; American Farm Bureau Comments at 10; ALTS Comments at 10; US LEC Comments at 8; MCI Comments at 17; MPower Comments at 8.

70 *E.g.*, Sprint Comments at 6.

71 RICA Comments at 6.

72 *Id.* at 6.

resale,"[73] and "offer[] none of the benefits for CLECs that should be obtainable through the negotiated agreements envisioned by the Act."[74]

The ILECs, predictably, view SGATs as over-inclusive of CLEC rights and portray them as a baseline for additional haggling by CLECs.[75] They find the proposed SGAT exemption to be a hindrance to the free and flexible negotiations that they promise to conduct.[76] Thus, their clear position is that, whatever an SGAT is, they do not wish to subject it to Congress's mandate for pick-and-choose.

Finally, no one can agree on how to treat incumbent carriers that are not RBOCs,[77] because Section 252 does not require those carriers to file an SGAT at all.[78] Competitors find it wasteful for non-RBOCs to have to perform this ritual,[79] while the Bells find it unfair that they would not.[80] At the least, the SGAT concept creates an uneven playing field among incumbents, where the Bells would have to offer their initial SGAT filing for pick-and-choose while non-Bells would designate a negotiated agreement as their "SGAT."[81] Thus, the Commission's attempt to avert violating Congress's intent by preserving pick-and-choose in this diluted SGAT form only poses more uncertainty and disparity for carriers.

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73 MCI Comments at 18.

74 NASUCA Comments at 23.

75 SBC at 2, 4-5; Verizon Comments at 6; USTA Comments at 5; RICA Comments at 6. *See also* BellSouth Comments at 6.

76 USTA Comments at 4-5; BellSouth Comments at 6-7; SBC Comments at 4-5.

77 American Farm Bureau Comments at 6; CenturyTel Comments at 6-7; Verizon Comments at 7; Sprint Comments at 6.

78 "A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers[.]" 47 U.S.C. § 252(f).

79 American Farm Bureau Comments at 10 ("It would be passing strange is the Commission were now to expand the SGAT vehicle to encompass ILECs generally rather than only BOCs[.]"); Sprint Comments at 6.

80 Verizon Comments at 7; SBC Comments at 5.

81 *FNPRM* n.2151. A subsequent version of the order lists this footnote as number 2149.

VI. THE RECORD DEMONSTRATES THAT CARRIERS REQUIRE GUIDANCE ON THE SCOPE OF THE PICK AND CHOOSE RULE

As the CLEC Coalition has illustrated for the Commission,[82] incumbents have abused or eviscerated pick-and-choose through stonewalling, bad faith insistence on incorporating terms other than those previously approved by a state commission, and by abuse of the "legitimately related" requirement in the *Local Competition First Report and Order*.[83] This conduct has impeded the "meaningful marketplace negotiations" that were intended by Congress.[84] The CLEC Coalition has therefore proposed, as the Commission requested, several "modifications"[85] to the pick-and-choose rule that will smooth the negotiating process considerably. Other parties have requested similar guidance.[86]

The Commission should amend Rule 51.809 by adding the following bright-line limitations:

- **Agreement provisions that are not obviously linked, such that separating them would effect an absurd result, are not legitimately related and cannot be imposed on CLECs seeking to adopt a portion of the underlying agreement, unless the underlying agreement expressly states otherwise.**

This guideline would in large part ensure that ILECs do not wield "legitimately related" as a sword against requesting CLECs that *de facto* requires full opt-in. For while certain interconnection terms logically hang together, it should be generally agreed that many do not. Unless separation of discrete terms of an agreement would be absurd, and render ILEC

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82 CLEC Coalition Comments at 13-16, 18.

83 SBC proudly trumpets the fact that it included a "Legitimately Related Provisions" attachment in the Texas 271 Agreement that was expressly designed to force CLECs to take several provisions of that agreement or none at all. SBC Comments at 5.

84 *FNPRM* ¶ 729.

85 *FNPRM* ¶ 729.

86 Verizon Wireless Comments at 8; MCI Comments at 20.

performance impossible, a requesting CLEC must be permitted to take one term independent of the other.

- **Carriers opting in to all or part of an existing interconnection agreement must not be required to adopt subsequent amendments or attachments that the original parties execute for the underlying agreement.**

This rule is exactly in keeping with the Commission's intent of treating interconnection negotiations more as typical commercial transactions.[87] In fact, Verizon Wireless agrees that forcing a third-party CLEC to accept a subsequent amendment executed by the initial parties "should be optional as opposed to mandatory, to prevent discrimination between competitive carriers."[88] In short, ILECs should not be permitted to force third-party CLECs to accede in perpetuity to ILECs' negotiations with other CLECs.

- **ILECs may not amend or alter the portions of agreements that CLECs adopt under pick-and-choose.**

This guideline, raised by MCI,[89] is the converse of the former suggested guideline. That is, just as ILECs should not impose contract amendments on a CLEC after the CLEC adopts an agreement, so also they should not tinker with previously executed agreements when a third-party CLEC wants to adopt them. Section 252(i) provides no room for ILECs to alter the text of "any interconnection, service, or network element provided under an agreement approved under this section." 47 U.S.C. § 252(i). Nor does anything in the *Local Competition First Report and Order* indicate that such alteration is appropriate; either the ILECs can block adoption of a section on technical feasibility, cost, or "legitimately related" grounds, or they

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87 *See FNPRM* ¶ 714 (seeking to enable "more meaningful negotiations").

88 Verizon Wireless Comments at 8.

89 MCI asks the Commission to hold that "incumbent LECs are not permitted to propose alterations to the terms of the underlying agreement being adopted." MCI Comments at 20.

must allow its adoption entirely.[90] The CLEC Coalition vigorously support this proposal, as its own members have been faced with repeated attempts by ILECs to force upon them language not previously negotiated or approved by a state commission.[91]

- **Amendments and attachments to, or portions of, interconnection agreements that by their terms supersede inconsistent language in subsequent agreements between the same parties must be preserved according to its terms, unless the parties mutually agree otherwise.**

When parties to an agreement execute an insular set of terms that by their express language supercede any portion of a subsequent agreement dealing with the same subject matter, that set of terms must be ported into the subsequent agreement, including an agreement created through the use of pick-and-choose, unless the parties mutually agree otherwise. Where the ILEC insists on including language in an interconnection agreement amendment expressly stating that it will supercede any corresponding provisions in a subsequent agreement, the ILEC should not be permitted to refuse a pick-and-choose or opt-in request based on the argument that "legitimately related" terms cannot be usurped as subsequently agreed to by the same ILEC. Such amendments typically address whether a compromise in pick-and-choose rights is part of the bargain. ILECs should not be permitted to extract additional concessions not bargained for via subsequent abuse of the Commission's pick-and-choose rule.

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90 *See* 11 FCC Rcd. at 16139, ¶ 1315.

91 When carriers adopt existing agreements with BellSouth, the ILEC responds, generally, with 100 pages of proposed changes in the terms of the agreement being adopted. These changes relate to items such as collocation, access to UNEs, and access to poles, ducts, conduit and rights-of-way. BellSouth refuses to process the adoption of the underlying agreement, even as those terms may have been amended, and instead requires that adopting carriers either agree to the changes being proposed, or negotiate new terms from its proposal, which often takes several months.

VII. CONCLUSION

For the foregoing reasons, the Commission should not eliminate the pick-and-choose rule, 47 C.F.R. § 51.809, as proposed in the *FNPRM*, but should retain the rule and amend it to provide further guidance as to the scope of the rule as commenters propose herein.

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November 10, 2003

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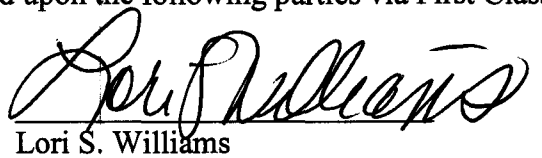
I, Lori S. Williams, hereby certify that on this 10th day of November, 2003, the foregoing Reply Comments of the CLEC Coalition was served upon the following parties via First Class Mail:



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